

STATE OF MICHIGAN  
COURT OF APPEALS

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LOUAY NAFSO and XZ, INC., d/b/a TOM'S  
SHOP RITE,

UNPUBLISHED  
March 22, 2005

Petitioners-Appellees,

v

CITY OF DETROIT and CITY OF DETROIT  
ZONING BOARD OF APPEALS,

No. 239546  
Wayne Circuit Court  
LC No. 01-134108-AZ

Respondents-Appellants.

ON REMAND

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Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Respondents, city of Detroit (city) and the city of Detroit Zoning Board of Appeals (BZA), appeal as of right<sup>1</sup> the circuit court order granting petitioners', Louay Nafso (Nafso) and YZ, Inc. d/b/a Tom's Shop Rite (Tom's Shop Rite), motion for superintending control that reversed the decision of the BZA, which had reversed the Detroit Building and Safety Engineering Department's (building department) conditional approval of petitioners' request to establish and operate a retail store/carry-out restaurant with both a specially designated merchant license and a specially designated distributor license. We conclude that the circuit court did not

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<sup>1</sup> Petitioners argue that this Court lacks jurisdiction over the appeal since the order appealed from is an appeal of a tribunal's order to the circuit court. Petitioners are correct that a party may not claim an appeal as a matter of right from such an order. See MCR 7.203(A)(1)(a). However, petitioners also sought from the circuit court a writ of superintending control. Indeed, petitioners argued that the circuit court should issue a writ in their favor instead of going forward with the appeal. "[A] party may not seek redress on appeal based on a contrary position to that which it took in the proceedings under review." *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Moreover, a complaint for superintending control is a separate civil action, *Schomaker v Armour, Inc.*, 217 Mich App 219, 223; 550 NW2d 863 (1996), and when properly filed provides an appeal as of right. *In re Grant*, 250 Mich App 13, 14; 645 NW2d 79 (2002). Thus, petitioners' jurisdictional challenge is without merit.

have jurisdiction to issue an order of superintending control, and therefore, we vacate the order of superintending control and remand for further proceedings.

## I. Facts and Proceedings

For over twenty years, Nafso owned and operated Tom's Shop Rite, a retail grocery store located at 11100 Mack Avenue. During this time, Nafso held a specially designated merchant (SDM)<sup>2</sup> license that allowed the sale of beer and wine from Tom's Shop Rite. In October 1998, Tom's Shop Rite petitioned the building department to transfer a specially designated distributor (SDD)<sup>3</sup> license that Nafso had purchased from a third party to Tom's Shop Rite to allow the sale of "spirits and mixed spirit drink." However, according to petitioners, the building department refused to consider documentation obtained by Nafso that showed sixty-seven percent of the residents within five hundred feet of 11100 Mack did not object to the SDD license transfer. Consequently, on February 11, 2000, Tom's Shop Rite filed an action for declaratory judgment against the building department, the BZA and the city seeking an order requiring the approval of its petition.

While this action was pending, Nafso met with representatives of the city of Detroit Planning and Development Department. An agreement was eventually reached under which Nafso would dismiss his lawsuit and submit a proposal to develop an abandoned theater building located at 11205 Mack Avenue. Under the agreement, Nafso would relocate Tom's Shop Rite into the abandoned theater building and operate with SDM and SDD licenses.

Nafso purchased the abandoned theatre building, closed Tom's Shop Rite, remodeled it, and leased it as a daycare facility. Nafso petitioned the building department to approve the transfer of both the SDM license from Tom's Rite Shop and the SDD license to the abandoned theatre building. Nafso also submitted the collected petitions of local residents that did not object to the SDD license transfer.

The building department held a public hearing on April, 25, 2000. Afterwards, the building department issued a conditional letter of approval to transfer the SDM and SDD licenses to the abandoned theatre, finding that:

Section 68.0000 of the Official Zoning Ordinance restricts the number of Controlled Uses of the same type or kind [of license] to two within a radial distance of 2000 feet of a proposed location.

A field inspection and search of City records has revealed that there is only (1) other SDM or SDD use within 2000 radial feet of the subject property, which SDM use is owned and operated by the Applicant and will be

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<sup>2</sup> MCL 436.1537(1)(e) provides that a specially designated merchant is a class of vendor that may sell beer and wine at retail for consumption off the premises only.

<sup>3</sup> MCL 436.1537(1)(f) provides that a specially designated distributor is a class of vendor that may sell spirits and mixed spirits drink at retail for consumption off the premises only

transferred/relocated to the subject property. Therefore the locational restrictions of Section 68.0000 of the Ordinance have been properly satisfied in this instance.

The specific findings of Section 65.0400 of the Detroit Zoning Ordinance have been properly satisfied in this instance.

In view of the above, it is the opinion of this Department that the conditional granting of your request would [appropriate] and could be accomplished without adversely affecting the surrounding land use and development.

Mack Alive, a neighborhood association of “area residents, churches and community organizations dedicated to improving its target area, revitalizing that area and improving the quality of life for its residents,”<sup>4</sup> appealed the building department’s conditional approval to the BZA. A hearing was held on August 14, 2001, and Mack Alive presented evidence that the establishment of a liquor store would have a detrimental impact on the area. After the hearing, the BZA made the following findings:

- (1) The Board found that the transfer of the SDM License and the establishment of a SDD License would be an attractive nuisance, which will exasperate the problems of loitering and litter.
- (2) The Board found that the beer, wine and packaged liquor will contribute to the blighting and downgrading of the surrounding neighborhood; thereby diminishing and impairing property values.
- (3) The Board further found that the original petitioners request to operate a SDM/SDD Licensed retail store will be detrimental to the area because of the problems associated with alcohol.
- (4) The Board further found that although there are no other liquor licenses within 2,000 feet of the property, there are more than adequate locations to purchase alcohol.
- (5) The Board further found that to deny the transfer of a SDM License and the establishment SDD License in keeping the spirit, intent, and purpose of the Zoning Ordinance.

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<sup>4</sup> Mack Alive was founded in 1992 and has a mission “to enhance the growth and development of the eastside of Detroit through a comprehensive approach that empowers, educates and elevates the entire community.” “[It] is an organization of area residents, churches and community organizations dedicated to improving its target area, revitalizing that area and improving the quality of life for its residents.” Mack Alive’s target area encompasses the 48214 zip code, and Mack Avenue is the “central corridor of this area.”

Petitioners then filed a complaint for superintending control in the circuit court along with an appeal of the BZA order. Following a hearing, the circuit court entered an “amended order granting petitioner’s [sic] request for superintending control to reverse the decision of the [BZA] and affirm the decision of [the building department.]” This appeal followed.<sup>5</sup>

## II. Superintending Control

Respondents first argue that circuit court abused its discretion by issuing an order of superintending control.

### A. Standard of Review

This Court reviews for an abuse of discretion a circuit court’s decision to grant or deny an order of superintending control. *Shepherd Montessori Center Milan v Ann Arbor*, 259 Mich App 315, 346; 675 NW2d 271 (2003); *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999).

### B. Analysis

MCR 3.302 governs complaints for superintending control, and provides in relevant part:

(A) Scope. A superintending control order enforces the superintending control power of a court over lower courts or tribunals.

(B) Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule (D)(2), and MCR 7.101(A)(2), and 7.304(A).

\* \* \*

(D) Jurisdiction.

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(2) When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder’s court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.

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<sup>5</sup> This Court previously granted petitioners’ “motion to dismiss pursuant to MCR 7.211(C) for the reason that the appeal is moot.” *Louay Nafso v City of Detroit*, unpublished order of the Court of Appeals, entered February 12, 2004 (Docket No 239546). On December 29, 2004, our Supreme Court vacated this Court’s February 12, 2004, order and “remanded this case to the Court of Appeals for plenary consideration.” *Louay Nafso v City of Detroit*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2004).

Petitioners had the right to appeal the BZA decision to the circuit court pursuant to MCL 125.585(11). Thus, an appeal was available and the “complaint for superintending control *must* be dismissed.” MCR 3.302(D)(2) (emphasis added); See also *Shepherd Montessori Center Milan, supra* at 346-347; *Choe v Flint Charter Twp*, 240 Mich App 662, 667; 615 NW2d 739 (2000) (superintending control is not an appropriate remedy where the issue concerned is subject to resolution on appeal); *Beer v City of Fraser Civil Service Commn*, 127 Mich App 239, 242-243; 338 NW2d 197 (1983) (an order of superintending control does not substitute nor supersede the use of normal appellate procedures).

Petitioners however argue that superintending control was proper because an appeal was not an adequate remedy. Petitioners claim that superintending control was proper to avoid the impending expiration of the SDD license, which was held in escrow by the LCC.<sup>6</sup> Petitioners cited concerns over “the inherent delay in the appellate process from a zoning board to the circuit court . . . .” (Petitioners’ Brief on Appeal, p 16). Initially, we conclude that the expiration of the SDD license was not, as petitioners suggest, a foregone conclusion. The LCC order specifically provided that “. . . it is the order of the Commission that this is the last extension to be granted in this matter *unless significant progress has been made* to transfer ownership and location of the licenses . . . .” (emphasis added). Moreover, LCC Rule 436.1107(2) indicates that the LCC has discretion to “extend the time for renewal.” Indeed, the LCC had previously granted petitioners extensions citing that significant progress was made to transfer the license. Further, it is questionable whether even certain expiration of a liquor license makes superintending control a proper remedy where the decision not to renew to the license is subject to review. See *J & P Market, Inc v Liquor Control Com’n*, 199 Mich App 646, 650-652; 502 NW2d 374 (1993).

Responding to respondents’ assertion that only an appeal was appropriate, counsel for petitioners claimed:

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<sup>6</sup> LCC Rule 436.1107(1) provides, in relevant part, that:

A license, which is not in active operation, shall be placed in escrow with the commission. The commission shall not renew a license placed in escrow until such time as the license is put into active operation.

Further, LCC Rule 436.1107(2) provides:

A licensee shall have only 1 year after the expiration of the license to renew the license and put the license into active operation, except upon good cause. If the licensee fails to renew the license within 1 year after its expiration, and the commission does not extend the time for renewal, all rights to the license shall terminate.

Though not raised on appeal, we observe that there are constitutional concerns implicated by a circuit court’s use of superintending control as a means of circumventing the decision-making powers granted to an administrative agency. See Const 1963, Art 3 Sec 2.

We couldn't file the appeal any quicker because of the time constraints. I had to – number one, wait until I got the official ruling from the zoning from the zoning board. Secondly I had to wait for the transcripts. There simply wasn't enough time.

However, the record reflects that the BZA ruling had been entered before petitioner had filed the complaint for superintending control, and that the BZA hearing transcript was prepared well before the circuit court conducted a hearing in this matter. Thus, petitioners failed to show how an appeal would not been an adequate remedy. Further, we also note that petitioner did not attempt to take advantage of court rules allowing appeals to expedited. See MCR 7.101(N).

Petitioners' reliance on case law is also misplaced, as the cases cited involve challenges directed toward the general policy or practice of a court. *In re Gosnell, supra*, at 326. See also *Detroit v Recorders Court Judge*, 85 Mich App 284, 288-289; 271 NW2d 202 (1978); *Wayne County Prosecutor v Recorders Court Judges*, 81 Mich App 317; 265 NW2d 134 (1978), and *Cahill v 15<sup>th</sup> Dist Judge*, 70 Mich App 1; 245 NW2d 381 (1976). Here, petitioners do not challenge a policy or practice of the BZA that could not be addressed by normal appellate procedures. Therefore, the circuit court abused its discretion in issuing the order of superintending control.

### III. Further Review of the Circuit Court's Decision

Petitioners argue that even if superintending control was inappropriate, the circuit court's decision should be affirmed because a circuit court has discretion to treat a complaint for superintending control as an appeal. *Krohn v Saginaw*, 175 Mich App 193, 196-197; 437 NW2d 260 (1988).

Although not decided by the circuit court, an issue may be considered on appeal if it was raised below and presents an issue of law as to which the necessary facts have been presented. *Hickory Pointe Village Homeowners Association v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004). Though petitioners requested the circuit court treat its complaint for superintending control as an appeal, the circuit court did not do so. The circuit court merely held that:

So I am satisfied that – the Petitioner's [sic] response I have read, and I am going to grant the motion for superintending control. This Court feels that – this being a court of equity, that equity would be served by granting the motion and the motion will be granted. Thank you.

The question then is whether petitioners have raised an issue of law as to which the necessary facts have been presented. *Id.* MCL 125.585(11) provides that “the circuit court shall review the record and decision of the board of appeals to insure that the decision:

- (a) Complies with the constitution and laws of this state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

Here, the circuit court did not apply MCL 125.585(11), and, for this reason, review is inappropriate. *Hickory Pointe Village Homeowners Association, supra*. A circuit court seated in review of a zoning case cannot substitute its judgment or discretion for that of the lower tribunal. Here, the circuit court reversed the BZA's decision without considering that the BZA is given discretion to resolve factual matters. Accordingly, we vacate the order of superintending control and remand for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood